Case Comment
Liability of Parent Company to Subsidiary's Employees (*IBIDEN CO.,LTD.Case*)[1]

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ABSTRACT

A parent company is a separate legal entity as distinct from its subsidiary and thus there is no legal relationship between the parent company and its subsidiary's employees (creditors). Nevertheless, under some circumstances, a parent company may be liable to its subsidiary's employees. This problem has traditionally been discussed not only in the area of company law but also employment law. Recently, the IBIDEN Supreme Court decision dealt with whether a parent company that had established the group internal control system is liable on the basis that the parent failed to appropriately operate the system. This comment introduces the decision and discusses its implications. It concludes that the Supreme Court decision substantially expanded the liability of parent company to its subsidiary's employees.

KEYWORDS: corporate group, liability of parent company, subsidiary's employees, legal compliance system, group internal control, sexual harassment, accessory obligation, good faith obligation

FACTS

IBIDEN Co., Ltd. (IBIDEN) had established a compliance system to ensure that directors and employees appropriately executed their duties and to guarantee the appropriateness of the corporate group's business (the legal compliance system). As part of the legal compliance system, IBIDEN established a compliance consult window (the consult window) that allows employees working at the offices of group companies, such as officers, employees and contract employees of group companies, to consult on matters concerning compliance with laws and regulations. Moreover, these persons were informed of the consult window system and encouraged to use it. If there was a request for a consultation with the consult window, they could respond to such an offer.

In November 2008, X was hired as a contract employee by IBIDEN Career Techno Corp. (Career Techno) and was engaged in a job that Career Techno undertook from IBIDEN KENSO Co., Ltd. (KENSO) at the factory within the office of IBIDEN (the factory); Career Techno and KENSO were subsidiaries of IBIDEN. Z was the Section Chief of KENSO from 2009 to 2010

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1 Supreme Court judgment of 15 February 2018, 1694 Saibansho Jiho79; 1549 Kinyu-Shoji-Hanrei 22.

and worked at KENSO's office located within the factory.

X met with Z while working at the factory, and they began dating around November 2009. However, X and Z gradually became less estranged around February 2010. By the end of July, X handed Z a letter stating that X wanted to break off the relationship with Z.

Nevertheless, Z could not end the relationship with X, and after August 2010, Z repeatedly approached X, who was working at the factory, and asked about their relationship. Z even went to X's home and so on (the First Act in Question). X was confused by Z's actions under the First Act in Question and gradually became ill.

Therefore, in September 2010, X consulted her direct boss, the subsection chief, to ask Z to help stop the First Act in Question. The subsection chief, however, only generally called attention to it during the morning assembly of the company and did not take any further action.

X consulted with the subsection chief on 4 October and with the section chief and subsection chief on 12 October about the First Act in Question, which continued after that. X left the company that day because Career Techno still did not take any action. Moreover, after 18 October, X began working in a different office of IBIDEN through a temporary agency. Nevertheless, on several occasions, Z parked his car near X's home between 12 October, when X left Career Techno, and late October and even also around January 2010 (Second Act in Question).

F, a contract employee of Career Techno and a colleague of X at the time when X was working at the factory, heard that X saw Z's car close to X's home. In October 2010, F offered consultation at the consult window for X and asked for measures such as confirming the facts for X and Z (the offer).

In response to the offer, IBIDEN let KENSO and Career Techno conduct hearing investigations with Z and other related parties. IBIDEN did not confirm the facts with X because Career Techno reported that there were no facts regarding the offer. In November, IBIDEN informed F that the facts regarding the offer could not be confirmed.

Then, X sued to pursue damages due to the tort against Z, the liability of employers against KENSO and the failure to perform the obligation ('saimu furiko') against Career Techno, claiming that X suffered damages by the First Act in Question and Second Act in Question. X also pursued damages against IBIDEN for the failure to perform the good faith obligation ('shingisoku jo no gimu') to take appropriate measures and the related actions required under the established legal compliance system.

THE DECISIONS AT FIRST INSTANCE

Gifu District Court Ogaki-shibu[2] denied the existence of the Act in Question by Z and rejected X's claim.

THE DECISION OF THE HIGH COURT

Nagoya High Court[3] affirmed the existence of the Act in Question and held that Z, KENSO, Career Techno and IBIDEN are liable as follows.

2 18 August 2015, 1543 Kinyu-Shoji-Hanrei 21.
3 20 July 2016, 1543 Kinyu-Shoji-Hanrei15.

(1) Z is liable for the tort on the Act in Question, and KENSO holds the liability of the employers for Z's tort. Career Techno also owes an accessory obligation ('fuzui gimu') under X's contract of employment, in which the employer should properly respond to the consultation from the worker regarding the working environment (the accessory obligation). Despite being consulted by X about the First Act in Question, the section chief and subsection chief of Career Techno did not take any action, such as confirming the facts or taking any subsequent measures, and whereby X had to leave Career Techno. Accordingly, Career Techno is liable for damages on the ground of the failure of the subsection chief and so on to perform the accessory obligation for X regarding the First Act in Question.
(2) Considering that IBIDEN has established a code of conduct for complying with the laws and regulations and established the legal compliance system including the consult window, IBIDEN owes a good faith obligation to take appropriate measures, either directly or through their group companies, for all employees of the group companies, which act as a single unit with regard to humans, physical and capital. In this case, as mentioned in (1) above, IBIDEN did not fulfil the good faith obligation because Career Techno, who had employed X, failed to respond based on the accessory obligation. IBIDEN also had a problem because, in October 2010, F asked the consult window for X to confirm the facts regarding X and the Second Act in Question. Nevertheless, IBIDEN's person in charge failed at this task and thereby did not eliminate X's fear and anxiety. From the foregoing, IBIDEN is liable to X based on the breach of the good faith obligation for the Second Act in Question.

THE DECISIONS AT THE SUPREME COURT

The Supreme Court[4] allowed the appeals by IBIDEN and dismissed the claims of X.

1. Parent company and accessory obligation under the contract of employment (Judgment 1)

X was employed by Career Techno and provided labour under the supervision of Career Techno by working at the plant. At the time of this case, IBIDEN had established employees standards of conduct, regarding compliance with laws and regulations, and a legal compliance system. However, there were no circumstances indicating that IBIDEN was in a position to exercise his command and supervision over X or to have had a substantial relationship with X to receive labour from X. There were also no circumstances where the specific contents of IBIDEN's legal compliance system requiring that IBIDEN fulfil the accessory obligation under the contract of employment borne by Career Techno as an employer or let Career Techno fulfil this obligation under the command and supervision of IBIDEN directly or indirectly.

From the foregoing, IBIDEN was not obligated to perform this accessory obligation either by itself or through Career Techno, the employer of X, and did not breach its good faith obligation to X simply because Career Techno failed to respond based on the accessory obligation.

4 15 February 2018, 1694 Saibansho Jiho79; 1549 Kinyu-Shoji-Hanrei 22.

2. Consult window response and good faith obligation (Judgment 2)

However, at the time of this case, IBIDEN established the consultation window as a part of the legal compliance system for employees working within the office of the group company to consult about issues concerning compliance with laws and regulations and made the consultation window known to the employees, promoting its use and actually responding to consultations. The purpose was to ensure the appropriateness of the business by the corporate group, which consisted of the group companies, to prevent acts, through consultation at the consult window, that violate laws and regulations that may arise during a group company's business or to deal with actual acts in violation of laws and regulations.

In light of these facts, it was assumed that if an employee, who has been damaged by an act that violates laws or regulations while working within the office of a group company, offers consultation to the consult window, then IBIDEN should strive to respond accordingly.

Therefore, depending on the specific circumstances of the offer, IBIDEN may have a good faith obligation, concerning the person who made the offer, to respond appropriately according to the constructed system and the contents of the consultation concerning the offer.

3. Application to this Case (Judgment 3)

Given that, X did not offer consultation to the consult window for the First Act in Question, IBIDEN does not owe the good faith obligation to X for the First Act in Question. In October 2010, IBIDEN also received a consultation request about X and the Second Act in Question from F at the consult window and then, asked KENSO and Career Techno to conduct an interview survey with Z and other related parties. F asked IBIDEN to confirm the facts and related information through the offer. It can not be said, however, that according to the specific contents of the legal compliance system, IBIDEN should responded just as per the request of who have offered consultation to the consult window. Additionally, the offer was about actions taken outside the office of the group company after X quit and was not directly related to the execution of Z's duties. Moreover, at the time of the offer, X was no longer working in the same workplace as Z, and more than eight months have passed since the Second Act in Question occurred.

Therefore, IBIDEN did not breach the good faith obligation to X giving rise to Y's liablity to X, even though IBIDEN did not respond to F's request to confirm the facts about X.

4. Conclusion (Judgment 4)

Therefore, IBIDEN has no liability to X due to IBIDEN's failure to perform the obligation or for the tort.

DISCUSSION

1. Issues and features of the case

In this case (hereinafter also referred to as *IBIDEN Case*), X claims that she has damaged from

the First Act in Question and Second Act in Question by Z[5]: (1) X pursued the damages due to the tort liability of Z, the liability of the employers of KENSO, the employer of Z and the liability for the failure to perform the obligation of Career Techno, the employer of X; and (2) X pursued the damages against IBIDEN, the parent company of Career Techno and KENSO, due to the failure to perform the obligation or the tort because the correspondence of the group consult window established by IBIDEN was inappropriate.

The Court of First Instance denied the existence of the First Act in Question and Second Act in Question and rejected X's claim. In contrast, the High Court affirmed the existence of the First Act in Question and Second Act in Question[6] and allowed X's claim. Because the appeal (1) was not accepted, only the appeal (2) was at issue in the Supreme Court. This is the first time the Supreme Court has judged the parent company's liability based on the actions taken in the group consult window on sexual harassment.

The issue in this case is whether a parent company is liable to the subsidiary's employees (creditors). This problem belongs to an area where employment law and company law intersect.

2. Legal compliance system and consult window

First, the legal compliance system is a group internal control that the parent company is obligated to establish under the Companies Act, and the consult window was established as part of such group internal control improvement. The parent company's board of directors is required to determine basic policies regarding the group's internal control system, including subsidiaries, and is responsible for monitoring and supervising the proper implementation and operation of business operations (Art. 362, para .4, no. 6 of the Companies Act, Art. 100, para. 1, no. 5 of the Ordinance for Enforcement of the Companies Act).

Among such group internal control, the consult window corresponds to the group whistleblowing system. The parent company needs to establish a self-policing action that lets group employees provide information such as violations of laws and regulations in advance because a scandal of the group company can be detrimental to not only the company but also the entire group company. The directors of the parent company, however, have a wide range of discretion as to what kind of internal control should be specifically built[7]. In addition, the parent company can, in principle, rely on the subsidiary's appropriate internal control system[8]. In recent years, the importance of such group internal control, especially the group whistleblowing system, has been increasing[9].

Second, the consult window was established under the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (Equal Opportunity

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5 The Supreme Court did not use the word 'sexual harassment' in the judgment, unlike the First Instance and the High Court.

6 It is said that the difference between the First Instance and the High Court on the existence of the Act in Question are due to the method of fact finding (Ikuko Mizushima,'Case Comment', 69 Osaka law review (1)131(2019)141-142).

7 Wataru Tanaka, *Kaisha-Ho* [Company Law] (2nd edn, Tokyo Daigaku Shuppan Kai 2018) 275.

8 Akira Tokutsu,'Case Comment', 82 HOGAKU (2)55(2018)67.

9 Ministry of Economy, Trade and Industry, 'Practical guidelines on the group governance system' <https://www.meti.go.jp/press/2019/06/20190628003/20190628003_01.pdf>; Tokyo Stock Exchange,'Corporate GovernanceCode',Principle2.5Whistleblowing.<https://www.jpx.co.jp/english/news/1020/b5b4pj000000jvxr-att/20180602_en.pdf> accessed 8 January 2020.

Act) as part of the obligation to take measures against sexual harassment and as a system for properly responding to consultations on sexual harassment, which are requirements of employers. The employer shall set out the necessary system to take appropriate measures in response to consultations from workers regarding sexual harassment in the workplace and take other necessary measures for employment management (Art. 11, para. 1 of Equal Opportunity Act). The Minister of Health, Labour and Welfare shall formulate the guidelines required by the Minister to ensure the appropriate and effective implementation of the measures to be taken by employers (Art. 11, para. 2 of the Equal Opportunity Act).

However, the employers are 'employers' under the contract of employment, and parent companies such as IBIDEN are not directly covered by the Equal Opportunity Act[10], which prescribes only a public law obligation and thus does not affect the employer's civil liability[11]. For the latter, however, when judging the liability of employers (Art. 715 of the Civil Code) or the breach of the duty to maintain a working environment, courts should consider whether sufficient precautions were taken in accordance with the Equal Opportunity Act and the guidelines based on it[12]. In this case, such a response at the parent company level was asked.

3. Related cases

There is no direct precedent for this case. However, there have been several cases where the liability of the parent company has been questioned or where the obligation to establish a group internal control by the parent company has not been fulfilled. To a limited extent, these cases are useful.

(1) Liability of parent company

First, when the court allows the parent company to be liable to the creditors (including the employees) of the subsidiary, the doctrine about piercing the corporate veil and tort liability are applicable.

So far, there are many cases in which the doctrine of piercing the corporate veil has been applied. In particular, in employment law, the doctrine has been used to affirm the parent company's liability to subsidiary's employees in cases such as disguise dissolution of the subsidiary[13]. It is, however, hard to say that the doctrine may apply to this case, even though IBIDEN is forming the group companies with strong integration in capital and employment relations[14].

Regarding tort liability, in *TOMAKOMAI FUTO CO., LTD. v Zeon Corporation Case*[15], the tort liability of the parent company to the subsidiary's creditor was an issue. In this case, the subsidiary's creditor alleged that the parent company made statements that raised the creditor's expectations that the parent would pay the subsidiary's debt, but Tokyo District Court rejected the claim. This case is similar to Judgment 2 in term of using the estoppel elements as the basis

10 Masahito Toki,'*Case Comment*', 246 Quarterly employment law147,152 (2019).
11 Yuichiro Mizumachi, *Rodo-Ho* [Employment law] (Tokyo Daigaku Shuppan Kai 2019)277.
12 ibid 277-278.
13 ibid 79-83.
14 Mizushima (n 6) 138.
15 29 November 2005, 1209 Hanrei Taimuzu 196.

for claim. In addition, recently in *Benesse Holdings, Inc. Case*[16], Tokyo High Court granted a parent company damages to its customers based on that the parent company failed to exercise its duty of care in properly supervising subsidiaries in the event of a leak of customer information by subsidiary employees. Unlike *IBIDEN Case*, it is worth noting that the parent company was held to be liable due to the defect in the group internal control.

In the following case, whether the 'directors' of the parent company breached a duty to establish the group internal control became an issue, although before the 2014 revision of the Companies Act. In *Nomura Securities Co., Ltd. Case*[17], Tokyo District Court ruled that a parent company's directors have no duty to manage the subsidiary unless there are special circumstances, assuming that a parent company is a separate legal entity as distinct from its subsidiary. Subsequently, however, in *FUKUOKA UOICHIBA CO., LTD. Case*[18], Fukuoka High Court affirmed the parent company's liability on the basis that, if there are signs of any problems or illegal actions at the subsidiary level, the parent company has an obligation to take appropriate measures, such as by exercising its shareholder rights. The latter case is conceived to have imposed a duty on the parent company's director to manage the subsidiary[19].

(2) Liability of employers for sexual harassment

Second, in cases where the employer failed to take appropriate measures regarding sexual harassment, the court ruled that the employer was liable for the failure to perform the obligation or the tort due to the breach of the duty to maintain a working environment under the contract of employment[20]. There have been, however, few cases where the expansion of the entity responsible for sexual harassment became a problem, similar to this case.

For example, in *Yokohama sekuhara Case*[21], an employee seconded from a parent company to a subsidiary sexually harassed a subsidiary's employee, Tokyo High Court affirmed the liability of employers at the seconded company. In addition, in *Toray Research Center, Inc. Case*[22], an employee seconded from a parent company to a subsidiary sexually harassed a dispatched worker at the subsidiary and the liability of the dispatched company and the parent company of the dispatch company became an issue. In this case, Otsu District Court dismissed the claim because the subsidiary was in the position to bear the liability of the employers, and a settlement was made between the subsidiary and the victim. Furthermore, in *TORAY ENTERPRISE CORP. Case*[23], where the victim in *Toray Research Center, Inc. Case* above was the plaintiff, Osaka High Court held to be liable the dispatch company. In any of those cases, unlike *IBIDEN Case*, the liability of the parent company to the subsidiary's employees did not become an issue.

According to these cases, the parent company should establish a group internal control, and if the parent company violates this obligation, the parent company (director) may be liable

16 27 June 2019. The decision is available on the Japanese court website: <http://www.courts.go.jp/app/files/hanrei_jp/874/088874_hanrei.pdf> accessed 8 January 2020.
17 5 January 2001, 1760 Hanrei-jiho 144.
18 13 April 2012, 1399 Kinyu-Shoji-Hanrei 24.
19 Wataru Tanaka (n 7) 275.
20 Yuichiro Mizumachi (n 11) 282.
21 20 November 1997, 728 Rodo-hanrei 12.
22 25 February 2010, 1008 Rodo-hanrei 73.
23 20 December 2013, 1090 Rodo-hanrei 21.

to the subsidiary's employees. However, there is still uncertainty regarding circumstances where the parent company is to bear such responsibility.

4. The logic of the decision

This section mainly discusses Judgments 1–3 of the decision.

(1) Parent company and accessory obligation under contract of employment (Judgment 1)

Judgment 1 discusses whether the parent company may have an accessory obligation to the employees of group companies under the contract of employment. The accessory obligation under the contract of employment mentioned here is an obligation to endeavour to provide a comfortable working environment for employees (duty to maintain a working environment).

In this regard, the High Court held that IBIDEN owes a good faith obligation to take appropriate measures, either directly or through its group companies, for all employees of the group companies that can be said to be single in the human, physical, and capital.

In contrast, Judgment 1 indicates the possibility that IBIDEN may owe an accessory obligation to X from the different perspective than the High Court. Judgment 1 states that IBIDEN may owe an accessory obligation to X if ① IBIDEN was in a position to exercise command and supervision over X, ② IBIDEN is in a relationship to receive substantial labour from X or ③ the specific contents of the legal compliance system developed by IBIDEN may have required that IBIDEN perform an accessory obligation under the contract of employment that Career Techno owed as an employer or to fulfil it under IBIDEN's control and supervision directly or indirectly.

① and ② are in line with the judgment framework of the precedent[24], in which the duty of considering safety (Art. 5 of the Contract of employments Act), an accessory obligation under the contract of employment, may arise even when there is no direct contractual relationship if a 'special social contractual relationship' exists[25]. In such cases, there is no objection that the parent company is liable to the subsidiary's employees beyond 'legal personality'.

According to (3), even if (1) and (2) do not exist, the parent company owes the subsidiary's accessory obligations under the contract of employment, if (a) the parent company fulfil the subsidiary's accessory obligation under the contract of employment or (b) the subsidiary fulfil the obligation under the direct and indirect supervision of the parent company. Although (a) is natural and indisputable, (b) is questionable.

Given the group internal control under the Companies Act, it is illegal for the parent company to be completely uninvolved in establishing internal control for subsidiaries. This is the case even if adopting a decentralized system in which the legal compliance system of the parent company and the subsidiary coexist (to a greater or lesser extent). The scope in which the parent company has an accessory obligation under contract of employment should be more limited than when the parent company is involved in establishing group internal control[26]. This

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24 In *Mitsubishi Heavy Industries, Ltd. Case*, Supreme Court affirmed the prime contractor's breach of the duty of care and safety to subcontractor's employees (11 April 1991, 759 Hanrei Taimuzu 95).

25 Masahiro Yano,'Case Comment', 761 Hogaku Seminar 123(2018)123; Mizushima (n 6)137-138.

26 According to the Companies Act, the parent company is obliged to establish group internal control, so if establishing group internal control is directly linked to that the parent company owes an accessory obligation under the contract of employment, the parent company would always have such a obligation. See,

can be agreed upon, for the time being.

Judgment 1, however, did not clarify when the requirements would be met. The problem is that depending on the situation of the group companies, it may be impossible to implement the duty to maintain a working environment without the facts ③. In this case, Career Techno does not have a consultation desk for sexual harassment, and if it was based on the instructions and approval of IBIDEN, it could violate IBIDEN's good faith obligation[27]. Therefore, if the requirement (b) is too strict, such a breach of the good faith obligation may be triggered.

(2) The consult window response and good faith obligation (Judgment 2)

Judgment 2 discusses whether IBIDEN may have an good faith obligation to the employees of the group company based on it has established the consult window.

Judgment 2 held that judging from the purpose that IBIDEN established the consult window as part of the legal compliance system, if an employee of a group company damaged by a violation of laws and regulations makes a consultation request, IBIDEN has to strive to respond accordingly.

It also ruling that 'depending on the specific circumstances of the offer', IBIDEN may have a good faith obligation to respond appropriately.

In addition, Judgment 2 assumes that a subsidiary that is the employer under the contract of employment owes a duty to maintain the working environment, and the decision created a new type of accessory obligation that is separate from it. In addition, Judgment 2 held that like the High Court, IBIDEN had promised to take on accessory obligation by setting up the consult window, while the decision considered that the scope of IBIDEN's liability is narrower than the ruling of the High Court.

Judgment 2, however, does not clarify the grounds upon which IBIDEN owes such a good faith obligation. In this regard, the commentators on this decision state the following views:

(a) (one-sided) Assumption of responsibility[28];
(b) A collective agreement between group companies to establish the legal compliance system[29];
(c) Creating reasonable expectations and trust for workers in group companies (estoppel) [30];
(d) A relationship similar to a contractual relationship that can be recognized in the specific context in which the consult window was used[31]; and
(e) The estoppel element that generally promised to maintain the consult window system and to respond accordingly and the specific expectations that the parent company will be able to handle by filing a specific violation of laws and regulations[32]

Further studies are needed to discuss the implications and evaluation of these opinions. As opinion (e) suggests, it is probably useful to break down the grounds on the good faith

Masashi Kitamura, 'Case Comment', 2121 Kinyu Homu Jijo 66(2019)69; Mizushima (n 6) 138.

27 Fumio Yamazaki,'Case Comment', 1919 Rodo horitsu junpo 22(2018)25.

28 Yano (n 25)123.

29 Shogo Hino,'Case Comment', 1531 Monthly jurist 204(2019)206.

30 ibid; Hiroaki Hara,'Case Comment', 154 Minshoho-zassi (6)113(2019)117.

31 Hisashi Takeuchi-Okuno,'Case Comment', 1517 Monthly jurist 4(2018)5.

32 Toki (n 10)155.

obligation into two elements: general promises and concrete expectations.
The current problem is what kind of response is appropriate from the consult window, but Judgment 2 does not mention this point.

(3) Application to this Case (Judgment 3)

Judgment 3 discusses whether there was a breach of IBIDEN's good faith obligation in this case.

The issue here is whether IBIDEN has taken appropriate action in response to consulting the consult window. First, Judgment 3 states that IBIDEN does not owe the good faith obligation to X for the First Act in Question because X did not offer consultation to the consult window for the First Act in Question. It is assumed that there is no objection to this point. Second, in response to the consultation request from F regarding the Second Act in Question, IBIDEN only asked KENSO and Career Techno to make an interview survey of Z and other related parties, but did not confirm any facts with her, as F requested. In this aspect, Judgment 3 held that IBIDEN did not breach its accessory obligation because it does not seems 'that according to the specific contents of the legal compliance system, IBIDEN should responded just as per the request of who have offered consultation to the consult window'.

Furthermore, Judgment 3 points out the following points: ① the offer was about actions taken outside the office of the group company after X quit; ② the offer was not directly related to the execution of Z's duties; ③ at the time of the offer, X was no longer working in the same workplace as Z; ④ more than eight months have passed since the Second Act in Question occurred.

Certainly, as the ruling says, what to do in the event of a consultation request is at the discretion of IBIDEN. This is consistent with the broad discretion of the parent company (director) in the construction and operation of the group internal control.

This indicates, however, that IBIDEN's response was inadequate for the following reasons. First, it is generally useful and necessary to confirm facts with victims to solve sexual harassment issues[33]. Second, in this case, the sexual harassment victim X and the assailant Z were employed by different subsidiaries and thus the role expected of the parent company IBIDEN was very important[34]. Third, regarding the First Act in Question, because Career Techno's consultation system did not function properly, if X had offered consultation to the consult window, IBIDEN would have the accessory obligation urging Career Techno to improve it and so on[35].

Considering these facts, it seems that the fact that the consult window did not confirm the facts for X is acceptable only on the condition that the above facts ① to ④ existed[36].

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33 Motokazu Endo,'Case Comment', Kinyu-Shoji-Hanrei 1566, 8(2019)12; See Ministry of Health, Labour and Welfare, 'Guidelines Concerning Measures to be Taken by Employers in terms of Employment Management with Regard to Problems Caused by Sexual Harassment in the Workplace', 3(3)イ <https://www.mhlw.go.jp/file/06-Seisakujouhou-11900000-Koyoukintoujidoukateikyoku/0000133451.pdf> accessed 8 January 2020.

34 Toki (n 10)156.

35 Yamazaki (n 27)26; Yukimi Ozeki,'Case Comment', 23 Sokuho Hanrei Kaisetsu 127(2018)129; Toki (n 10)156.

36 Shigeo Nakayama,'Case Comment', 1524 Monthly jurist 131(2018)134; Toki (n 10)156.

5. Scope and significance of the decision

(1) Scope of the judgment

This ruling recognizes the consult window as part of the development of an internal control system under the Companies Act. Therefore, the scope of this ruling, especially Judgment 2, extends to the consult on violations of laws other than sexual harassment[37]. For example, if an subsidiary's employee offers a consultation request for a 'Reportable Fact' at the consult window, the parent company must respond in accordance with the Whistleblower Protection Act[38].

(2) Significance of the judgment

Many commentators find it significant that the decision conclusively rejected the claim but the parent company may be liable to employees of the subsidiary under certain circumstances[39]. From my point of view, however, the decision substantially expanded the liability of a parent company to the subsidiary's employees. In this regard, judgment 1(3)(b) and Judgment 2 are important.

Judgment 1③(b) clarified that if the parent company performs the accessory obligation under the contract of employment or lets the subsidiary implement the duty under the supervision of the parent company, the parent company may owe the subsidiary's accessory obligation under the contract of employment.

Judgment 2 revealed that if an employee of the group company offers a consultation to the consult window, the parent company may have the good faith obligation to respond appropriately to the applicant, depending on the specific situation of the offer.

These judgment indicates that the more the parent company is involved in the group company, in other words, the more the parent company promises to take concrete measures at the stage of establishing the group internal control system, the more the obligation of the parent company are increased. As a result, it is pointed out that the parent company may hesitate to develop such a system[40].

Such concerns, however, are off the mark. It is because a parent company is obliged to established the group internal control system (the legal compliance system) in accordance with the Companies Act and thus it is unacceptable for the parent company to not involved in the performance of the accessory obligation under the contract of employment. If a subsidiary alone is not able to fulfil the accessory obligation (as well as *IBIDEN Case*[41]), the parent company should act to ensure that these obligation are fulfilled. The parent company is also obliged to ensure that the consult window functions properly because the consult window established as part of the internal control system under the Companies Act. For example, given the strong unity of the IBIDEN group companies and the much greater degree of social contact

37 Toki (n 10)155-156.

38 Toshiaki Yamaguchi,'Case Comment', 15 Business Homu (6)70(2018)74; Takeshi Yanagisawa,'Case Comment', 91 Horitsu jiho (1)134(2019)137.

39 Yoichiro Hamabe,'Case Comment', 16 Aoyama law journal 55(2018)60; Takeuchi-Okuno (n 31) 5; Tokutsu (n 8) 69; Yamaguchi (n 38) 73; Kitamura (n 26) 69; Hino (n 29) 206; Mizushima (n 6) 137; Toki (n 10) 155. and so on.

40 Yanagisawa (n 38)137; Toki (n 10)156.

41 See (n 36).

between the parent company IBIDEN and plaintiff X[42], it was clear that IBIDEN should take such measures. If the parent company fails to do so, it would breach not only the duty of care of the parent company directors (Art. 423, para.1 of the Companies Act) but also the good faith obligation of group company's employees[43]. In other words, it is not legal for a parent company to have 'hands-off' involvement with a group company to avoid its liability.

Seem from this perspective, it can be said that this decision which affirmed the obligation based on the parent company's involvement for group internal control substantially expanded the liability of a parent company to the subsidiary's employees.

Of course, the parent company (director) has wide discretion in the construction and operation of group internal control, and also, the parent company can, in principle, rely on its subsidiaries.

Some actions taken by the parent company at the group level may be assessed as a voluntary act at the level of corporate social responsibility (CSR), rather than the performance of legal obligation.

In recent years, however, there have been cases where a measures based on the CSR are used in judicial decisions[44]. Therefore, the parent company may be held liable based on the response to stakeholders of the group company that it has officially declared, even though the boundary with a legal obligation is not clear or even originally not legal duty[45].

Furthermore, with the 2014 revision of the Companies Act and the spread of ESG (environmental, social, and governance) investment and CSR procurement, the level required to the companies for group internal control is increasing. In addition, the liability of the parent company in a corporate group, including the supply chain, is attracting attention, since the adoption of the United Nations Guiding Principles on Business and Human Rights (UNGP) in 2011, especially human rights due diligence[46]. Amid this kind of situation, it appears that this decision is very significant.

CONCLUSION

This comment introduced and discussed the IBIDEN Supreme Court ruling in which a parent company was held liable to its subsidiary's employees. The Supreme Court eventually dismissed the plaintiff's claim but held that a parent company may owe the subsidiary's accessory obligation under the contract of employment (Judgement 1) and the good faith obligation to the

42 Yanagisawa (n 38)136.

43 Hamabe (n 39) 63.

44 For example, in *Olympus Corporation Case*, Tokyo High Court granted the boss's tort of the victim and the liability of employers based on the retaliatory relocation made in violation of the company's voluntary charter of business conduct and the rules of compliance(31 August 2011, 1035 Rodo-hanrei 42).

45 Recently, the UK Supreme Court indicated that a parent company in the UK of multinational company group may be directly liable to third parties damaged by the environmental pollution of its overseas subsidiary when it declared to supervise or control to its group companies through its group-wide policies and guidelines(*Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents*) [2019] UKSC 20 (10 April 2019) [52-53](Lord Briggs)). This shows the significant weight afforded by the court to such a company's statement in determining the duty of care towards stakeholders.

46 Nicolas Bueno, 'Corporate liability for violations of the human right to just conditions of work in extraterritorial operations' (2017) The International Journal of Human Rights, 21 (5) 565, available at <http://eprints.lse.ac.uk/75781/1/Bueno_Corporate%20liability_2017.pdf> accessed 8 January 2020.

subsidiary's employees (Judgement 2). This decision not only showed that, by taking measures based on the group internal control, a parent company may be liable to its subsidiary's employees under some circumstances, but also substantially expanded the liability of parent company to its subsidiary's employees. However, the theoretical basis for (the expansion of) liability of parent company and its specific factors are still unclear. It is hoped that more cases will address this issue in the future.